STATE OF MICHIGAN

COURT OF APPEALS

RAPALLA FRAME, Individually and as Personal Representative of the Estate of MICHELLE LEE FRAME, Deceased,

Plaintiff-Appellant,

v

ROYAL OAK TOWNSHIP FIRE DEPARTMENT, JERRY L. SADDLER, OAKLAND COUNTY SHERIFF'S DEPARTMENT and MICHAEL BOUCHARD,

Defendants-Appellees,

and

NORMAN ARLINGTON, ROYAL OAK TOWNSHIP FIREFIGHTERS, JOHN DOE, JANE DOE, JOHN ROE and JANE ROE,

Defendants.[1]

UNPUBLISHED
August 12, 2003

No. 239921
Oakland Circuit Court
LC No. 01-033363-NO

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to Royal Oak Township Fire Department and Jerry L. Saddler, and a previous order granting summary disposition to Oakland County Sheriff's Department and Michael Bouchard. We affirm.

[1] Norman Arlington is the Royal Oak Township Fire Department Chief. John Doe and Jane Doe are Royal Oak Fire Department firefighters. Jerry L. Saddler is Royal Oak Township Supervisor. Michael Bouchard is Oakland County Sheriff. John Roe and Jane Roe are Oakland County Sheriffs.

I. Basic Facts and Procedural History

Plaintiff alleged that on April 6, 2000, he left his daughter Michelle at their home under the supervision of his landlady. When he returned, the home was on fire. A Royal Oak Township fire truck arrived immediately after plaintiff who ran toward the burning house. An unidentified Oakland County Sheriff prevented him from entering. Plaintiff told the Sheriff that his daughter was sleeping on the bed just inside the front window. Plaintiff further alleged that the Sheriff stated they "would get her," and ordered plaintiff to wait across the street. Plaintiff made two more attempts to enter the burning house, but was stopped each time. Despite telling at least two other deputies where his daughter was, he saw no attempts to rescue Michelle. Firefighters attempted to connect a fire truck's fire hose, but were unable to do so immediately. Plaintiff alleged that it took the Royal Oak Township Fire Department ten minutes to fix the problem and that fifteen minutes elapsed from the time he arrived until water was used on the house. Michelle died in the fire.

Plaintiff alleged that defendant firefighters were negligent and reckless in extinguishing the fire, attempting to rescue Michelle, and operating a motor vehicle. Plaintiff also alleged that Saddler, Arlington, Bouchard, Royal Oak Township, and Royal Oak Township Fire Department breached approximately forty-five separate duties which generally encompassed maintenance of equipment and supervision, training, and hiring of employees. Plaintiff also alleged breach of contract against the Oakland County Sheriff's Department and Bouchard asserting that he, as a resident of Royal Oak Township, was a third-party beneficiary of a contract between Royal Oak Township and Oakland County Sheriff's Department.

Oakland County Sheriff's Department and Bouchard moved for summary disposition under MCR 2.116(C)(7) and (C)(8) arguing that plaintiff failed to state a cause of action because (1) the Oakland County Sheriff's Department is not a legal entity capable of being sued, (2) the Oakland County Sheriff's Department had no duty to plaintiff under the public duty doctrine, and (3) governmental and qualified immunity barred the claim against them.

In response, plaintiff argued that (1) the Oakland County Sheriff's Department was a legal entity to the extent that it could enter into contract with Royal Oak Township, (2) summary disposition would be premature because discovery requests regarding the alleged contract were still outstanding (3) the "special relationship" exception to public duty doctrine applies and (4) further discovery would permit a determination of whether Bouchard is entitled to immunity.

The trial court first held that because Bouchard is the highest elected official in the Oakland County Sheriff's Department, he is entitled to immunity under MCL 691.1407. In regard to the Oakland County Sheriff's Department, the trial court held that it was immune under MCL 691.1407(1). The trial court also held that plaintiff had failed to show a promise made for his benefit. The trial court granted the Oakland County Sheriff's Department and Bouchard's motion for summary disposition.

Royal Oak Township Fire Department and Saddler also moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff failed to state a claim because (1) Royal Oak Township is a municipality protected by absolute immunity under MCL 691.1407, (2) Royal Oak Township Fire Department is not an entity amenable to suit, and (3) Saddler, as the supervisor of Royal Oak Township, is protected by qualified immunity under MCL 691.1407.

Plaintiff responded arguing that Royal Oak Township was not protected by immunity because the facts pleaded established the motor vehicle exception to governmental immunity, MCL 691.1405. Plaintiff also argued that further discovery was required to determine whether Saddler was entitled to immunity.

The trial court held that the Royal Oak Township Fire Department is not a separate legal entity against which a tort action can be maintained. The trial court also held that Saddler, holding the highest elected position in Royal Oak Township, is entitled to immunity under MCL 691.1407(5). In regard to plaintiff's argument that governmental immunity was not applicable under the motor vehicle exception, the trial court held "the alleged negligent use of equipment on the fire truck does not constitute operation of a motor vehicle." Further, the trial court found that "any acts associated with the equipment were ancillary to the operation of the truck itself." The trial court granted the Royal Oak Township Fire Department and Saddler's motion for summary disposition. On appeal, plaintiff only addresses three aspects of the trial court's rulings.

II. Third-Party Beneficiary

Plaintiff first argues that the trial court erred in granting summary disposition of his third-party beneficiary claim. We disagree and note initially that although plaintiff pleaded a breach of contract claim, he failed to attach a copy of the contract as an exhibit to his complaint as required by MCR 2.113(F)(1). Nor did he state in his complaint that the contract was in the possession of the adverse party or inaccessible to him as required by MCR 2.113(F)(1)(b) and (F)(1)(c). Because the exhibit would be considered part of the pleading for all purposes, MCR 2.113(F)(2), and is properly considered in a motion pursuant to MCR 2.116(C)(8),[2] we find that plaintiff failed to state a claim based on the contract when plaintiff failed to produce said contract or state in its pleading why he failed to do so. Plaintiff's pleadings are insufficient as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); MCR 2.116(C)(8).

Even based on a review of the document provided to this Court,[3] we find that the trial court properly granted summary disposition pursuant to MCR 2.116(C)(8). A grant or denial of summary disposition based upon a failure to state a claim is reviewed de novo on appeal. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Maiden*, *supra* at 119. The motion should be granted only when the claim is so clearly

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[2] *Woody v Tamer*, 158 Mich App 764, 770; 405 NW2d 213 (1987).

[3] In his brief on appeal, plaintiff references "the 'form' contract that was supplied at the hearing on December 5, 2001[.]" Our review of the transcript from that hearing reveals that a contract was supplied to plaintiff and shown to the trial court judge at that time. Bouchard has attached what is presumably that same contract to his brief on appeal. However, this contract is not found in the lower court record. This Court is limited to reviewing the record presented to the lower court. MCR 7.210(A); *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). Even so, plaintiff argues in his brief on appeal that this "is not a copy of the actual contract. That was never provided to Plaintiffs or to the Court."

unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.*

Pursuant to MCL 600.1405:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person. [*Brunsell v Zeeland*, 467 Mich 293, 296; 651 NW2d 388 (2002).]

"When determining whether the parties to the contract intended to make a third person a third-party beneficiary, a court should examine the contract using an objective standard." *Dynamic Const Co v Barton Malow Co*, 214 Mich App 425, 427; 543 NW2d 31 (1995). There is a distinction between intended third-party beneficiaries who may sue for a breach of a contractual promise in their favor, and incidental third-party beneficiaries who may not. *Brunsell, supra* at 296. "Third-party beneficiary status requires an express promise to act to the benefit of third-party and where no such promise exists, the third-party cannot maintain an action for breach of contract." *Dynamic Const Co, supra* at 428. Although a third-party beneficiary may be a member of a class, there are limitations:

> [A] third-party beneficiary may be a member of a class, but the class must be sufficiently described. This follows ineluctably from subsection 1405(1)'s requirement that an obligation be undertaken *directly* for a person to confer third-party beneficiary status. As can be seen then, this of course means that the class must be something less than the entire universe, e.g., "the public"; otherwise, subsection 1405(2)(b) would rob subsection 1405(1) of any narrowing effect. The rationale would appear to be that a contracting party can only be held to have knowingly undertaken an obligation *directly* for the benefit of a class of persons if the class is reasonably identified. Further, in undertaking this analysis, an objective standard is to be used to determine from the contract itself whether the promisor undertook "to give or to do or to refrain from doing something *directly* to or for" the putative third-party beneficiary. [*Brunsell, supra* at 297-298, quoting *Koenig v South Haven*, 460 Mich 667, 680; 597 NW2d 99 (1999) (internal citations omitted).]

We find that the trial court properly granted summary disposition on the basis that plaintiff failed to state a claim that he was a third-party beneficiary to the contract between the Oakland County Sheriff's Department and Royal Oak Township. The Oakland County Sheriff's Department's promise to Royal Oak Township is presumed to have been made to benefit Royal Oak Township. *Oja v Kin*, 229 Mich App 184, 193; 581 NW2d 739 (1998). While plaintiff alleged he was a resident of the municipality, he has not met his burden of showing the Oakland County Sheriff's Department expressly promised "to give or to do or to refrain from doing something directly to or for [him]." *Brunsell, supra* at 298. Therefore, the trial court did not err in granting summary disposition on this basis.

III. Governmental Immunity

Plaintiff next argues that the trial court erred in granting summary disposition to Oakland County Sheriff's Department on the basis of governmental immunity because the pleaded facts fall within the special relationship exception to the public duty doctrine. We disagree and hold that, even if Oakland County Sheriff's Department owed a duty under the special relationship exception to the public duty doctrine, summary disposition was proper based on governmental immunity. See *Smith v Kowalski*, 223 Mich App 610, 615; 567 NW2d 463 (1997) (holding the presence of a "special relationship" for purposes of the public-duty doctrine does not preclude dismissal based on governmental immunity).[4]

Applicability of governmental immunity is a question of law which is reviewed de novo on appeal. *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995). When considering a motion brought under MCR 2.116(C)(7), this Court considers all the affidavits, pleadings, and other documentary evidence filed or submitted by the parties. *Patterson v Kleiman*, 447 Mich 429, 433; 526 NW2d 879 (1994), citing *Haywood v Fowler*, 190 Mich App 253, 255-256; 475 NW2d 458 (1991). Also, all well-pleaded allegations are accepted as true and construed most favorably to the plaintiff. *Id*. Moreover, the contents of the complaint must be accepted as true unless specifically contradicted by the affidavits or other appropriate documentation submitted by the movant. *Id.* at 434 n 6. Summary disposition is proper when a claim is barred because of immunity granted by law. *Fane v Detroit Library Comm'n*, 465 Mich 68, 74; 631 NW2d 678 (2001).

Pursuant to MCL 691.1407(1), "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." *Chandler v Muskegon Co*, 467 Mich 315, 317 n 1; 652 NW2d 224 (2002).

There is no dispute that the Oakland County Sheriff's Department is a governmental agency and was engaged in the exercise or discharge of a governmental function. Plaintiff only pleaded the gross negligence exception to governmental immunity against the Oakland County Sheriff's Department. The gross negligence exception to immunity applies only to governmental officers, employees, members, and volunteers -- not to governmental agencies themselves. *Smith v Dep't of Public Health*, 428 Mich 540, 605 n 19; 410 NW2d 749 (1987); *Gracey v Wayne Co Clerk*, 213 Mich App 412, 420; 540 NW2d 710 (1995), citing MCL 691.1407(2), overruled in part on other grounds, *American Transmissions, Inc v Attorney General*, 454 Mich 135, 141-143; 560 NW2d 50 (1997). Because the gross negligence exception to immunity is inapplicable to the Oakland County Sheriff's Department, the trial court properly granted summary disposition on this basis.

[4] Plaintiff has not addressed the trial court's governmental immunity ruling on appeal.

IV. Motor Vehicle Exception to Governmental Immunity

Finally, plaintiff argues that the trial court erred in granting summary disposition of his claim of negligent operation of fire truck equipment because the facts pleaded fell under the motor vehicle exception to governmental immunity. We disagree.

Pursuant to MCL 691.1405:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948. [*Roy v Dep't of Transportation*, 428 Mich 330, 338; 408 NW2d 783 (1997).]

"The Legislature has not defined 'operation' for the purpose of MCL 691.1405." *Chandler, supra* at 319. However, our Supreme Court recently held that the term "operation" refers to the ordinary use of the vehicle *as* a motor vehicle, namely, driving the vehicle. *Id*. at 321-322. Plaintiff has not alleged that the Royal Oak Township Fire Department or Saddler negligently drove the fire truck. Rather, plaintiff alleged defendants lacked training, improperly maintained the fire truck, and negligently used the fire truck's hoses to extinguish a fire. Training, maintenance, and use of fire hoses are not ordinary uses of the vehicle as a motor vehicle. Therefore, the trial court properly granted summary disposition on this basis.

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly